82-1122

Supreme Court, U.S.
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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

LAWRENCE M. JOHMANN
Petitioner

v.

EVELINE G. JOHMANN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the New Jersey courts violated Article 1, Section 10, Paragraph I; Article IV, Section 2, Paragraph 1; and Article VI, Paragraph 2 of the United States Constitution by their flagrant disregard of and their decisions not in consonance with New Jersey case and statute law, by bending or ignoring the rules of court and evidence as they saw fit, by their elimination of the obligation of the marital contract without just cause or reason, by their failure to grant the Petitioner-defendant the same previliges and immunities as afforded criminals or citizens of other states.
2. Whether the New Jersey courts have violated the petitioner-defendant's and his childrens' rights under Articles 1, 5 and 7 of the New Jersey Constitution and the IV, XIII, and XIV Amendments to the United States Constitution by interfering in the

marriage without justification or proof of wrongdoing, by forcing the petitioner-defendant out of his home and depriving him of a meaningful relationship with his children, by awarding much of his personal property to the plaintiff without valid reason or cause, by subjecting him to involuntary servitude through mandated support and alimony payments and the payments of plaintiff's lagal fees which were used to harass and extort assets from him, and by their failure to grant him equal protection and due process under the law.

3. Whether the New Jersey courts have violated the petitioner-defendant's and his childrens' Constitutional rights by their discriminatory awarding of sole custody of the children to their mother, contrary to their best intrests, and contrary to N.J. law and policy of the courts.
4. Whether the New Jersey courts have failed to protect the Constitutional rights of the petitioner-defendant by their failure

to act on or even address the issues after he repeatedly informed them that his Constitutional rights were being violated.

LIST OF PARTIES

The caption of this case contains all the parties within the meaning of Rule 21.1(b) of the Rules of this Court.

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REPORTS AND OPINIONS ISSUED BELOW

The opinion of the New Jersey Superior Court, Chancery Division, Ocean County relating to granting a divorce in this matter, dated April 2, 1981 appears in the Appendix at page A-1. The Final Judgment for Divorce entered by the N.J. Superior Court, Chancery Division, Ocean County dated April 28, 1982 appears in the Appendix at page A-5. The opinion of the N.J. Superior Court, Appellate Division entered Marcn 30, 1982 appears in the Appendix at page A-10. The opinion of the N.J. Superior Court, Chancery Division, Ocean County as a result of the Appellate Divisons remand of the property distrbution aspects of the case appears in the Appendix at page A-19. A revised judgment has never been signed in this matter. The denial, by the New Jersey Supreme Court, of a Petition for Certification on October 5, 1982 appears in the Appendix at page A-23.

A Psychiatric Evaluation Report on both

parties by Dr. Avraham Z. Isseroff dated May 14, 1980 was supplied to the lower court prior to the trial and was introduced as evidence (P-1) at the time of trial (T2FEB81-P29). A Child Custody Investigation Report by the Ocean County Probation Department, dated April 20, 1980 was supplied to the lower court prior to the trial and was introduced as evidence (P2) at the time of trial (T2FEB81P29). A Psychiatric Evaluation Report on the defendant and Lawrence Johmann Jr., the oldest boy of the marriage, dated June 21, 1982 by Robert S. Dengrove M.D. was supplied to the lower court prior to a Change of Circumstances, Custody and Support hearing on July 22, 1982. A copy of the report should be part of the lower court record.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to Article III, Sections I and II of the United States Constitution; Title 28

U.S.C. §1257 (3); and Rule 17.1 (b) and (c) of the Rules of this Court.

The Petitioner - Defendant respectfully prays that this Court review this entire matter since the New Jersey courts have either grossly violated or ignored his United States Constitutional rights as well as those of his children, and continue to do so. The New Jersey courts' decisions and opinions are also contrary to and in conflict with the New Jersey Constitution, and both statue and case law as well as the decisions and opinions of this Court and the court's of last resort in other states.

Specific judgments or opinions sought to be reviewed are as follows:

1. Final Judgment for Divorce - entered April 28, 1981 (Ref. Appendix p. A-5).

2. Appellate Court Opinion - entered March 30, 1982 (Ref. Appendix p. A-10).

3. Lower Court Opinion on Remand - issued June 18, 1982 (Ref. Appendix p. A-19).

4. Denial of Petition for Certification - entered October 5, 1982 (Ref. Appendix p. A-23).

This Petition is timely filed within the ninety (90) day period established by Title 28 U.S.C. §2101 (c) and Rule 20.4 of the Rules of this Court.

The Petitioner is a born citizen of the United States and the Respondent was a born citizen of West Germany at the time of this action and is still believed to be a foreign national.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article I, Section 10, Paragraph 1 of the United States Constitution.

> "No State shall...; pass any Bill of Attainder, ex post facto Law, or Law Imparing the Obligation of Contracts...."

Article IV, Section 2, Paragraph 1 of the United States Constitution.

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Article VI, Paragraph 2 of the United States Constitution.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary not withstanding".

IV Amendment, United States Constituion.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,.."

XIII Amendment, United States Constitution.

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, snall exist within the United States, or any place subject to their jurisdiction."

XIV Amendment, United States Constitution, Section 1.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Constitution of New Jersey.

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are

those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and of pursuing and obtaining safety and happiness."

Article 5, Constitution of New Jersey.

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right,..."

Article 7, Constitution of New Jersey.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated;.."

N.J.S. 2A:17-56.1 - Failure to Make Support and Maintenance Payments; Inapplicability of Limitations on Execution; Priority.

"In any proceeding brought for failure to make support and maintenance payments, upon a showing that such payments are more than 45 days overdue, the court may grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds, or profits of the defendant for the full amount of both arrears payments and for the satisfaction of current support and maintenance payments not withstanding any statutory limitation on executions issued against the wages, earnings, salary or other income of the judgment debtor an such execution shall have priority over any other executions."

N.J.S. 2:34-2 - Causes For Divorce From Bond Of Matrimony.

"Divorce from the bond of matrimony may be adjudged for the following causes heretofore or hereafter arising:
a. Adultry;
b. Willful and continued desertion for the term of 12 or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife;
c. Extreme cruelty, which is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant; provided that no complaint for divorce shall be filed until after 3 months from the date of the last act of cruelty complained of in the compliant, but this provision shall not be held to apply to any counterclaim;
d. Seperation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation, provided, further that after the 18 month period there shall be a presumption that there is no reasonable prospect of reconciliation;
e. Voluntarily induced addiction of habituation to any narcotic drug as defined in the New Jersey Controlled Dangerous Substances Act P.L. 1970, C226 or habitual drunkenness for a period of 12 or more consecutive months subsequent to marriage and next preceeding the filing of the complaint;
f. Institutionalization for mental illness for a period of 24 or more consecutive months subsequent to marriage and next preceeding the filing of the complaint;

g. Imprisonment of the defendant for 18 or more consecutive months after marriage, provided that where the action is not commenced until after the defendant's release, the parties have not resumed cohabitation following such imprisonment;
h. Deviant sexual conduct voluntarily performed by the defendant without the consent of the plaintiff."

N.J.S. 2:34-23 - Alimony; Maintenance; Custody and Maintenance of Children; Orders; Equitable Distribution of Property.

"Pending any matrimonial action brought in this state or elsewhere, or after judgment of divorce or maintenance, whether obtained in this state or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a reciever thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by

other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circutstances may require.

In all actions brought for divorce from bed and board, or nullity, the court may award alimony to either party and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.

In all actions for divorce or divorce from bed and board where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the state as well as the ability of the plaintiff to pay in determining an amount of maintenance to be awarded.

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate and equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift, devise, or bequest shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution."

N.J.R.S. 9:2-4 - Custody of Minor Children

"In making an order or judgment relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, and they shall be equally charged with their care, nurture, education and welfare, and the happiness and wellfare of the children shall determine the custody or possession. If a child is of sufficient age and capacity to reason so as to form and intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof.

The court may make the necessary orders and judgments from time to time in relation to such custody or possession, but the father, as such, shall not have preference over the mother as to the award of custody of such minor child if the best interests of the child otherwise may be protected, and in no case shall the court having jurisdiction in this state over the person and custody of any minor permit such child to be removed from this state where the mother or father resides in the this state and is the suitable person who should have the custody of such child for its best welfare."

Rules of Painter - Painter v. Painter 65 N.J. 198. (1974)

"Criteria which may be taken into account in determining an equitable distribution of marital assets are: (1) respective age, background and earning

abilities of parties, (2) duration of marriage (3) standard of living of parties during marriage, (4) what money or property each brough into marriage, (5) present income of parties (6) property acquired during marriage by either or both parties, (7) source of acquisition, (8) current valve and income-producing capacity of property, (9) debts and liabilities of parties to marriage, (1) present mental and physical health of praties, (11) probability of continuing present employement at present earnings or better in future (12) effect of distribution of assets on ability to pay alimony and support, and (13) gifts from one spouse to other during marriage."

STATEMENT OF THE CASE

This action commenced with the filing of the Respondent's Complaint in the New Jersey Superior Court, Chancery Division, Ocean County on August 15, 1979. The case went to bench trial on February 2, 1981. A Final Judgment For Divorce was entered on April 28, 1981. The petitioner filed an appeal which was neard by the New Jersey Superior Court Appellate Division on March 16, 1982, a decision for a partial remand was rendered on March 30, 1982. A decision, by the Chancery Division, on remand has not been issued yet. The Petitioner asked the New Jersey Supreme Court to review the Appellate Court's decision on a Petition for Certification dated April 29, 1982 and the Court denied the petition on October 5, 1982.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

A complaint for Divorce and supporting affidavit were filed by the Respondent - Plaintiff, hearafter referred to as plaintiff, on August 15, 1979 in the Superior Court of New Jersey, (Da6,Da18). Docket No. M-28346-78 was assigned. The complaint falsely and maliciously charged the Petitioner - Defendant, hereafter referred to as defendant, with extreme cruelty commencing on or about July 1968 (3 months prior to the marriage) and continuing until August 1979.

A Show Cause Order (Da22) was issued by Judge J.M. Havey based on the divorce complaint and was received by the defendant on Saturday afternoon, August 18, 1979. The order was returnable August 20, 1979 at 9AM, thus the defendant had no time to respond or obtain counsel. N.J. Court Rule 4:67-3 requires that "orders to show cause, together with a copy of the complaint and affidavits similarly certified, shall be served at least

10 days before the return date." At the August 20th hearing, Judge Havey ordered the defendant to pay the plaintiff $75/wk. for food and granted her temporary custody of the two minor children (Da26)(T20AUG79). There was absolutely no grounds or cause for such an order. The defendant and plaintiff were cohabiting and the defendant was fully supporting the family as he had from the inception of the marriage. The defendant's sister and his oldest son, Larry Jr. age 10, willing appeared in court to verify that he was more than adequately caring for his family. The plaintiff had no evidence or witnesses to support her false and malicious claim.

Judge Havey, by his actions, violated the defendant's Consititutional rights under the Due Process and Equal Protection clauses of the XIV Amendment, violated Article VI, Para. 2 of the United States Constitution, and violated his rights under Articles 1 and 5 of the Constitution of New Jersey.

On October 19, 1979, the defendant was

again requied to appear in court before Judge E.D. Serpentelli regarding the plaintiff's Pendente Lite Relief Motion. This time the court ordered the defendant to pay the plaintiff the sum of $100 per week support, and placed other restrictions on him (Da62). The plaintiff and defendant were still cohabiting at this time and the defendant was providing the family full support. The plaintiff had no evidence or witnesses to any wrongdoing on the defendant's part. Despite duly filed opposition papers and arguements of the defendant's counsel, Judge Serpentelli granted the plaintiff relief without grounds or cause (T190CT79). This is contrary to the N.J. case law, Schiff v. Schiff, 116 N.J. Super. 546, 283 A.2d 131 (1971).

> "When bona fides of an application for pendente lite relief is questionable, preliminary relief will be denied"; and "Applications for pendente lite relief must make out a prima facia case".

Judge Serpentelli, therefore, violated the defendant's Constitutional rights under the Due Process and Equal Protection clauses of

the XIV Amendment and violated Article VI Para. 2 of the United States Constitution, and violated his rights under Articles 1 and 5 of the Constitution of New Jersey.

The defendant informed his attorney on several occassions during this time frame that he felt that his constitutional rights were being violated by the courts since the plaintiff had no evidence to support her claims. The attorney responded "that the rules are different in civil matters, proof was not necessary, only that the judge be convinced the plaintiff wanted a divorce."

On February 2, 1981 the defendant appeared, pro se, to defend himself in the divorce trial. The defendant was forced to go pro se because he could not afford the 8 to 10 thousand dollars his attorney wanted to represent him. The trial was necessary because the proposed settlement, was totally unacceptable. The defendant's attorney strongly advised him to accept the proposed settlement stating, "it was the best he could hope for."

She indicated the judge would penalize him if he didn't agree to the proposed terms. Upon refusing to accept the settlement, the defendant released his attorney and subsequent ly discovered she had not adequately represented him. The attorney never filed a most pretrial memorandum on his behalf, as was required by the 1980 Rules of Court 4:79-11(b). The divorce trial was switched to juvenile Judge, W.J. Kearney, after the plaintiff's attorney met alone with Judge Serpentelli, in his chambers, on February 2, 1981. The defendant protested the switch of judges to no avail. Numerous incidents took place during the trial that span a portion of three days, where the defendant's rights were denied by Judge Kearney and where the defendant was not granted due process or equal protection under the laws. On the first day of the trial (February 2, 1981), when the defendant was cross examining the plaintiff about an affair she had, the court interrupted and asked him "Is there any such thing

as justification for cruelty," then stated "You know, its the old he called me a name so I hit him kind of justification". Thus implying the defendant had treated the plaintiff cruel, (T2FEB81P49L12). Subsequently Judge Kearney called the defendant "an aggravating man" (T2FEB81P49L24). When the defendant tried to point out to the court the plaintiff's conflicting statements about his failing to provide food for the family in her complaints and direct testimony vs her cross examination answer that "we eat very well." Judge Kearney stated "She hasn't claimed you starved her, sir..." (T2FEB81P62L20). Yet this is one of the plaintiff's main contentions throughout this entire matter.

On February 3, 1981, Judge Kearney refused to grant the defendant a requested second psychiatric opinion (T3FEB81P9). He also permitted Dr. Isseroff's report to be introduced into evidence, but refused to give the defendant opportunity, to question him unless the defendant paid the doctor's court fee,

(T3FEB81P5). There was never any testimony to support Dr. Isseroff's or the Probation Department's report, therefore both fall into the category of hearsay and are not valid evidence. When the defendant tried to introduce police reports into evidence Judge Kearney ruled that they were hearsay and would not be admitted (T5FEB81P39L23). Judge Kearney then refused to interview the defendant's oldest son Larry Jr, age 11 1/2, contrary to N.J. Statute N.J. R.S. 9:4-2 and case law, Mayer v. Mayer, 150 N.J. Super. 556 (1977) and Beck v. Beck, 86 N.J. 480 (1981), (T5FEB81P78L23). When the defendant questioned the plaintiff about her claim that she saw evidence in the form of a motel bill that he was having an affair, when said bill was Valentines Day dinner which he had taken her. Judge Kearney stated "I don't care if you took the Mayor of Mantoloking out to dinner," (T3FEB81P38L6). He then stated your whole line of cross examination has indicated to me a pattern of cruelty, (T3FEB81P38L18). If

the purpose of cross examination is not to show that the adversary is not telling the truth then what is its purpose? Subsequently when the defendant tried to prove the plaintiff was lying about not having access to a car, Judge Kearney stated "she is not on trial for perjury" (T3FEB81P48L5), implying it didn't make any difference if she lied or not. This notion is completely contrary to all principles of our legal system. At the beginning of the second day of trial when the defendant inquired about the possibility of obtaining daily transcripts, Judge Kearney told him he ought "to save his money for alimony and child support." This statement suggests that the outcome of the trial had already been decided. Shortly thereafter Judge Kearney stated "he felt that the defendant was treating the plaintiff per the traditional concept of a German housewife". (Both statements and related conversations were omitted from the court transcript (T3FEB81-P3L14,P19L19), under the false pretense that

the court reporter could not hear or understand the dialog. The defendant had a witness who heard the dialog at the rear of the courtroom and submitted an affidavit along with the defendant's Motion to Settle the Record, which was denied. Throughout this entire action Judge Kearney indicated that he recognized much of the defendant's arguements. However, he discouraged the defendant from introducing a number of proofs in his possession.

> The Court. "Without marking them in as evidence I'll state specifically for the record the pictures indicate there is a very complete renovation and ... and improvement of a house from the time of purchase until some later date during the ownership by the defendant" (T3FE8-81P83L24)..."That the existence of extreme cruelty and the side by side existence of vacation trips or luxurious activities of one sort or antoher don't really ring true." (T2FE881P67L19). "...The incidents of violence that I have heard about have been A, mostly by the plaintiff, ..." (3FE881P98L14).

During the third day of trial Judge Kearney stated, "I philosophically and professionally give divorce a rather low priority here." (T5FE881P58L12).

In his Divorce Decision Letter (A-1) Judge Kearney granted a divorce to the plaintiff for extreme cruelty, based on a personality conflict between the parties. He characterized the defendant's attitude in court as "obsessive compulsive", which per definition is really the attitude the plaintiff exhibited, throughout this action, by her obsessive, malicious, irrational and compulsive lying.

The plaintiff never suffered any physical or mental cruelty at the hands of the defendant which endangered her well being in any way shape or form, or made it improper or unreasonable for her to live with him. The fact that the plaintiff was still voluntarily cohabiting and sleeping with the defendant, as well as playing a wifely role in the relationship is proof positive that N.J.S. 2A:34-2(c) was not a valid grounds for divorce (Da-211-1). The plaintiff, over the entire course of this action did not offer one shred of evidence, proof, or corroborative testimony to support her claim. On the other hand

the defendant denied, under oath, each and every allegation of wrongdoing and provided a substantial amount of evidence to support his case, and expose the plaintiff's lies. He also had witnesses available, in court, at the time of trial to support his case. (T3-FEB81P31L21, P32L12). These witnesses were never utilized since the plaintiff never proved her case.

New Jersey case law states; "Although public policy of New Jersey is to terminate dead marriages, a showing that a particular marriage is dead is not enough for divorce, rather parties and situations must meet specific criteria established by the legislature before the court may query the marriages viability". Babushik v. Babushik, 157 N.J. Super. 128, 384 A.2d 574 (1978). "It is the duty of the trial judge, even in uncontested cases where an annulment is sought, to see to it that severance is not granted except where warranted under applicable statutes ..." B. v. S. 99 N.J. Super. 429, 240

A.2d 189 (1968). "Objective proof of lack of liability in the relationship is required to determine what marriages are eligible for dissolution". Ellam v. Ellam, 132 N.J. Super. 358, 333 A.2d 577 (1975). Divorce petition not sustained by adequate proof should be dismissed." Duerner v. Duerner, 142 N.J. Eq. 759, 61 A.2d 307 (1948). "Divorce will not be granted upon the uncorroborated admissions or testimony of a party to the suit and this rule applies not only to the cause, but to every element in the proofs necessary to sustain it." Crowell v. Crowell, 33 N.J. Super. 272, 110 A.2d (1954). "Where testimony of plaintiff made out case of extrememem cruelty, rule of corroboration required belief in its truthfullness find support in testimony of others or of surrounding established circumstances." Scalingi v. Scalingi, 65 N.J. 180, 320 A.2d 475 (1974). "There is a requirement for sufficient evidence to support a "cruelty" allegation." DiVito v. DiVito, 136 N.J.

Super. 580, 347 A.2d 375 (1975). Also, Kazin v. Kazin, 161 N.J. Super. 174, 391 A.2d 536 (1978) required the plaintiff to prove her allegations against the defendant.

Judge Kearney stated "if the defendant had filed fewer papers this may have escaped notice of the Court." The fact is, and the record shows, the defendant only filed one pretrial paper and directly following the trial filed papers only in direct response to papers filed by the plaintiff (Da121-157). He further states "this is a true Gazzilla, sic. case..." The roles of the plaintiff and defendant are almost completely reversed between this case and Gazzillo, which supports the defendant's arguement (Db41)(Drb8), Gazzillo v. Gazzillo, 153 N.J Super. 159, A.2d 288 (1977).

Judge Kearney improperly awarded the plaintiff sole custody of the children. He refused to interview the children as is requied by N.J.R.S. 9:2-4 and case law, Lavene v. Lavene, 148 N.J. Super. 267, 392 A.2d 621

(1978). Mayer v. Mayer, op. cit., S.M. v. S.J., 143 N.J. Super. 379 (1976), Sheehan v. Sheehan, 38 N.J. Super. 120 (1955) It is well settled in New Jersey that neither parent, absent of serious misconduct, has a superior right to the award of custody. Both parents are equally charged with the care, education, maintenance and welfare of their children, Scanlon v. Scanlon, 29 N.J. Super. 317 (1954). N.J.R.S. 9:2-4 gives both parents equal rights to custody establishing as the criterion for award the "best interests of the child." E v. T., 124 N.J. Super. 535 (1973). S. v. H.M., 111 N.J. Super. 553 (1970); DiBano v. DiBano, 105 N.J. Super. 415 (1969). Mayer v. Mayer, op. cit. Awarding custody to the plaintiff in light of her actions was definately not in the best interest of the children. Judge Kearney also improperly awarded the plaintiff counsel fees and an unreasonable amount of support. He also awarded the plaintiff a large portion of the defendant's personal assets acquired before

the marriage, which are not distributable under N.J.S. 2A:34-23, also Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974),

> "The span of time embraced in statutory provisions governing equitable distribution of property extends from marriage of parties to date complaint for divorce was filed."

Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974).

> "Any property owned by husband or wife at time of marriage will remain seperate property of each spouse and in event of divorce will not qualify as an asset eligible for distribution; and if such property, owned at time of marriage, later increases in value, such increasement enjoys a like immunity; furthermore income or other usufruct derived from such property, as well as any asset for which original property may be exchanged or into which it, or proceeds of its sale, may be traceable shall similarly be considered seperate property of particular spouse."

Mol v. Mol, 147 N.J. Super. 5, 730 A.2d 509 (1977).

> "Where the marital home was owned by the husband prior to the marriage, the wife is entitled to share in those elements of increase in which she contributed ..."

In addition Judge Kearney failed to consider

the debts of the marriage in his property distribution as is requied by the Rules of Painter.

When the proposed Final Judgment for Divorce was submitted to the defendant for review and comment under the "five day rule" he objected to it in both form and content (Da149). The order not only included all of the aspects of Judge Kearney's decision letter, it also included specific assets which were fabricated or deliberately inflated by the plaintiff's attonrey's. The defendant's objections clearly pointed out that the order was not consistant with New Jersey case or statute law and was not supported by legal basis, and if signed would violate the defendant's New Jersey and United States Constitutional Rights, (Da155). Judge Kearney ignored the defendant's objections and signed the order on April 28, 1981 (A-5). The defendant then applied for a Stay of the Order, (Da160) which Judge Kearney refused to grant.

He also filed a Notice of Appeal (Da 165).

Judge Kearney's decision in granting the plaintiff the divorce and child custody was based largely on the tainted, biased, unsupported and unsubstantiated report of Dr. Isseroff. Judge Kearney admitted this in a hearing on June 4, 1982, after the oldest boy ran away from the plaintiff's custody.

> "I assume that if someone is ... Mr. Johmann is going in now to seek to amend the order as to custody, that he is going to go before the court supported by something which will contradict the reports of Dr. Isseroff, which I adopted." (T4JUN82P20L24).

In a hearing on a none related matter on the same day, Judge Kearney made the following statements to a witness in his court,

> "Why did you misquote these letters to me?", "Old doctrine in law that says falsus in uno, falsus in omnibus. If you don't tell the truth about everying, I'm justified in not believing you about anything." (Partial transcirpts of recorded proceedings, (T4JUN82P4L17-P5L6) Lawrence Prinz v. Bernard Van, Docket #82-1349-22).

In the defendant's case, Judge Kearney didn't care if the plaintiff was blatantly

lying and ignored her lies, yet in Prinz v. Van id. he was concerned over a falsely preceived misquote. In Judge Kearney's decision letter dated June 18, 1982 as a result of the N.J. Appellate Court remand of the property distribution aspect of this matter he stated "...the husband was certainly the more reliable and credible witness ..." (A-21)

Judge Kearney, by his actions, clearly violated the defendant's rights under Articles I, IV & VI and the IV, XIII & XIV Amendments of the United States Constitution, as well as Articles 1,5 & 7 of the N.J. Constitution. He also violated or ignored N.J. case and statute law, N.J. Rules of Court and the Code of Judicial Conduct, Cannons 2 & 3.

The defendant subsequently applied for a Stay of the Order to the N.J. Appellate Court (Da 185). His legal arguement supporting the request for stay pointed out that the order violated N.J. law and the N.J. and U.S. Constitutional rights of the defendant and his

children (Da186).

The plaintiff at this time filed a Motion to Enforce Litigant's Rights and the defendant filed an opposition to said motion. In his opposition the defendant again pointed out the Final Judgment was not in consonance with N.J. law and violated his constitutional rights, that he couldn't turn assets over to the plaintiff which did not exist and that the defendant was fully supporting the plaintiff, contrary to her false and malicious claims (Da181). On June 24, 1981, the defendant received notification that his appeal had been docketed and the number A-3887-80T1 was assigned. In a hearing on the plaintiff's motion on June 26, 1982, Judge Serpentelli ignored the defendant's arguements and gave him five days to comply with the Final Judgment. The defendant then applied for an Emergant Stay to the Appellate Court on June 30, 1981, which was denied. However, the Appellate Court did subsequently grant a partial stay of the asset distribu-

tion on July 17, 1981 (Da203). On July 23, 1981 the defendant received a $96. paycheck from his employer. When questioned the reason why, his employer provided a copy of an Order for Enforcement of Litigant's Rights, Bench Warrant and Wage Execution for non support, and failure to comply with Final Judgment signed by Judge Serpentelli. Until this time, the defendant was unaware of the court's actions against him and was never provided a copy of the order as required under Court Rule 4:42-1(b). The defendant immediately filed an Application for Stay of the Order (Da206) which was never answered although it remains on file. In the request for Stay, the defendant provided the court cancelled checks as proof he was providing more support to the plaintiff than was required. He also pointed out that the Appellate Court had stayed portions of the Final Judgment so he did not have to comply on these issues, and that he had purchased the car in contention from the plaintiff. He

pointed out that the order's execution based on N.J.S. 2A:17-56.1 was invalid since there was no failure to support. Ballard v. Ballard 164 N.J. Super. 560, 397 A.2d 383 (1978) was cited to support his arguement.

On August 26, 1981 the defendant voluntarily appeared in court, pro se, before Judge E.A. Costigan, in an attempt to resolve the above matter. The defendant argued he was not in arrears and was complying with the court order, except the parts stayed, as best he could. The defendant referred to line items of prior court transcripts, the cancelled checks provided to the court, the Appellate Court Stay as well as the inconsistancies of the plaintiff's claims to support his case. Judge Costigan totally ignored the evidence and the arguements presented by the defendant and the fact his Constitutional right's were being grossly violated by the unwarranted continued harassment by the plaintiff. Instead, he believed the plaintiff's false allegations and had two burly

constables in court to intimidate the defendant. In several instances he threatened to have the defendant incarcerated (T26-AUG81P40L23, P45L5, P52L4). Once again the plaintiff did not provide the court with one shred of evidence or proof to support her arguement. At the end of the hearing Judge Costigan gave the defendant 5 days to comply with the order or go to jail.

It was obvious from Judge Costigan's statements that no matter how right he was or what kind of proof he had, the defendant could not win. Therefore, the defendant's parents were forced to hire an attorney to try to keep him out of jail. Another hearing took place before Judge Costigan on September 23, 1981. The defendant's attorney argued his case and presented Judge Costigan with the identical proofs the defendant provided in the August hearing. This time the plaintiff's attorney recognized the Appellate Court Stay, and that most of the items not stayed were taken care of. Judge Costigan

ruled that the defendant was not in support arrears, and should be granted credit for excess support provided, (T23SEP81P27L8). The changes of position by the plaintiff's attorney and Judge Costigan's ruling in favor of the defendant are proof that there was never a cause for enforcement of litigant's rights, wage garnishment, bench warrent or the three court hearings. Yet the wage garnishment was never removed and the defendant was ordered to pay the plaintiff's attorneys $975 for the three court appearances.

It is unconscionable that any person in a court action has to pay the adversary's legal fees when such action is taken in bad faith for the purpose of harassment. New Jersey case law clearly states,

> "one of the prime considerations in awarding a "wife" counsel fees is her "good faith" in instituting the action and prosecuting the suit. Lavene v. Lavene, and Mayer v. Mayer, op cit.

The defendant pointed out in court papers filed in opposition to the motion and in oral

arguement before the court on the first two hearing dates that his Constitutional rights were being violated. However, the court ignored his arguement.

By their actions Judge Serpentelli and Judge Costigan violated the defendant's Constitutional rights under Article VI, and the IV, XIII, and XIV Amendments of the United States Constitution as well as Articles 1, 5 & 7 of the N.J. Constitution. They also violated or ignored N.J. Case and Statute law the N.J. Rules of Court.

On August 10, 1981 the defendant submitted his Appeal Brief on time, in the manner prescribed. He raised the question of the trial court's violation of, or failure to act in consonance with the law and his N.J. and U.S. Constitutional rights on all issues in dispute (Db38-51, Drb6-17). The plaintiff failed to respond on time. Despite the fact that the Civil Appeal Scheduling Order (Da167) and the Rules of Court state that parties failing to file their documents on time would be pre-

cluded form further action, the Appellate Court permitted the plaintiff to file her response papers almost four months late for no valid reason, over the defendant's objection. Even then the plaintiff's brief did not conform to the rules for its preparation, but it was still allowed.

The appeal was argued on March 16, 1982 before Judges Botter and Antell. The defendant again stressed that the plaintiff had no grounds for divorce under N.J. law and that the lower courts had disregarded N.J. laws and the defendnat's and children's Constitutional rights. He pointed out that in Beck v. Beck, op. cit. that the N.J. Supreme Court upheld the trail court's award of joint custody despite the fact that the two children in question were adopted females, that the father left the marital residence and did not seek joint custody when he filed the complaint for divorce after an eighteen month separation. In the defendant's case, he is the natural father of both

boys, never left the marital residence until forced to over three months after the Final Judgment was issued, tried to prevent the breakup of the marriage and sought either sole or joint custody of the children from the outset, if the divorce was to be granted.

The defendant also pointed out in Beck v. Beck, id, the N.J. Supreme Court cited Bratt, Joint Custody, 67 Ky. L.J. 271, 282 n.45 (1979),

> "That the root of the joint custody arrangement is the assumption that the children in a unified family setting develop attachments to both parents and severance of either of these attachments is contrary to the childs best interest."

It also relied on the testimony of Dr. Judith Greif who stated,

> "As long as both parents are fit the most important thing is to maintain the childs open and meaningful access to both parents," "It is contrary to the best interests of the children to deprive them of an adequate parent simply because the other is deemed better." "Visitation is not meaningful contact."

The Supreme Court further stated,

> "As in all custody determinations, the preference of the children of sufficient age and capacity must be accorded due weight." "Joint custody does not require the parents to have an amicable relationship, a successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their role as parents." "Tne potential for cooperation should not be assessed in the emotional heat of the divorce."

In additon the defendant cited the Kotelchuck Harvard Medical School Studies on father deprivation and paternal absence, which shows that there is an enormous body of scientific evidence concerning the critical importance of the father, in child development especially when the children are boys; the FBI Crime Statistics, which demonstrate that a child raised in a fatherless home will probably commit anti social behavior and accept a life of crime more readily; and the American Psychological Associations Resolution, dated January 1977 banning sex discrimination against men in custody matters as be-

ing scientifically and psychologically baseless, as well as a violation of human rights.

Despite the defendant's arguements the Appellate Court failed to disturb the trial court's ruling on the divorce or custody issues, however, it did remand the property distribution question back to the trial court for further proceedings, (A-10). The Appellate Court falsely stated that the appellant withdrew his attack upon the divorce judgment (A-11). The defendant never withdrew his attack on the divorce judgment. He did state that because of the past years events he no longer wanted to be married to the plaintiff, and that in view of all the animosity created and prepetuated by the legal system that there was little chance of reconciliation. He very clearly stated that if the court wanted to uphold the divorce, it should be granted solely to the defendant on his valid counterclaim, not to the plaintiff on her malicious and groundless complaint.

By failing to disturb the trial court's

decision granting the plaintiff a divorce without valid grounds and granting her sole child custody, as well as excessive alimony and legal fees contrary to N.J. case and statute law and the best interests of the children, the Appellate Court failed to protect the defendnat's or his childrens rights. It violated its obligation under Article VI of the U.S. Constitution by failing to protect their rights guaranteed by Articles I and II and the IV, XIII and XIV Amandments to the U.S. Constitution as well as Articles 1, 5 & 7 of the New Jersey Constitution.

Based on the partial remand, the defendant made application for legal fees and court costs as allowed by N.J. Court Rules 2:11-4 and 4:42-9(b) on April 5, 1982, within the required time. To date the defendant has still not received a decision on his motion.

On April 10, 1982 the defendant filed a Notice of Petition for Certification to the Supreme Court of New Jersey. Docket # 19,820 was assigned. The defendant argued that the

plaintiff had no grounds for divorce and that she should not have been granted sole custody of the children even if the divorce was granted. He cited case and statute law to support his arguement. He also argued that the Constitutional issues raised in his appeal briefs should have been addressed. On April 29, 1982 he submitted his Petition for Certification within time and in the form required. Again the plaintiff failed to respond within the time required.

During this time frame the defendant also submitted a Letter Memorandum of Law to Judge Kearney regarding the Appellate Court remand of the Property distribution issue. This letter clearly pointed out, referencing trial transcript pages, that the amount of money recieved from the sale of the 1st home was $24,400. Over $22,000 of this money was subsequently used towards paying off the mortgage principle and other loans on the Bowline Street home, and adjacent property. He pointed out that the $1,000 gift from the

defendnat's grandmother's estate, which was used to purchase the adjacent property, was not subject to distribution per N.J.S. 2A:34-23. He also argued that the trial court must apply the standards established in the Rules of Painter op cit. in determining distribution, Perkins v. Perkins, 159 N.J. Super. 243-247, consideration of only some of the Paintercriteria may result in a reversal on appeal. Also trial judges must define clearly the criteria used in awarding equitable distribution, Pascarella v. Pascarella 165 N.J. Super. 558 (1979). It was also pointed out that a judges unsupported belief that the plaintiff faced "unusual difficulties" to enter the marriage is not a criteria in Painter and should not be a factor in property distribution just as marital wrongdoing is not a factor to be considered when allo cating property between spouses, Chalmers v. Chalmers, 65 N.J. 186 (1974), neither should "unusual difficulties" even if factual. In Chalmers, id. the court stated equitable dis-

tribution is actually the allocation of property which each spouse helped acquire, and the decision should be based on the actual contributions of each spouse in fact to that acquisition and on other criteria as set forth in Painter. The defendant also pointed out that the debts of the marriage were not distributed per the Rules of Painter.

On June 18, 1982, Judge Kearney issued a revised decision letter in which he admitted failure to recognize the value of the property the defendant brought into the marriage (A-19). However, the $15,000 cited is not a valid figure, the amount is closer to $22,000. Judge Kearney did not address the more than $3,000 debts of the marriage or the personal furnishings of the defendant still remaining in the house. He then stated the plaintiff was entitled to receive 55% of the remaining proceeds from the sale of the home and the defendant 45% after the deduction of the defendant's $15,000. Judge Kearney's revised decision is still not in consonance

with the law. Further, an amendment to the Final Judgment has yet to be signed. When it is, the defendant will appeal it once again on the grounds it does not grant him what is rightfully his and does not conform to law.

It should be noted that the defendant requested that Judge Kearney remove himself from this case as he had filed a complaint against him with the Judicial Ethics Committee for his blatant violation of the law and the defendants rights at the time of the trial and in his Final Judgment. However, Judge Kearney refused to do so.

During this time period the defendant's oldest son, Larry Jr., age 13 ran away from the custody of the plaintiff and came to live with the defendant. The defendant on June 3, 1982 filed a Motion for Change of Child Custody, Reduction of Alimony and Child Support, Credit for Support and Legal Fees, Elimination of Garnishment and Restraint Order. A hearing was scheduled before matrimonial Judge D.F. Campbell on June 18, 1982. On

June 3, 1982 the defendant was notified that he would have to appear in court on Friday, June 4, 1982 before Judge Kearney to respond to a Motion for Immediate Enforcement of Litigant's Rights made by the plaintiff. The plaintiff never filed papers in this action as is required by N.J. Court Rule 1:6-3. Motion papers were hand carried into court at 3:10 PM by the plaintiff's attorney at the start of the hearing. The defendant was again forced to lose a days work and had to hire an attorney to defend him in this unwarranted action. By even agreeing to hear such an action without proper papers being filed, the court was again violating the defendant's rights of due process and equal protection under the law. Without a lawyer it was clearly evident that the defendant did not stand a chance.

The plaintiff's and her attorney's affidavits submitted to support her motion were once again full of lies and bald allegations which complained of issues settled the prev-

ious year. They also accused the defendant of brainwashing Larry Jr.. The fact is the plaintiff wasn't properly caring for the boy and was making him do most of the housework under threat of punishment. The boy was doing poorly in school and was truent from school for 8 days in October 1981 alone, before the defendant found out about the problem resolved it. After a lengthy arguement by both attorneys before Judge Kearney, he ruled that he would not hear the motion. As part of the justification for the decision Judge Kearney stated,

> "I do not see in this case that passage of an additional ten days or whatever we're taking about will have any cosmic significance insofar as the mental health of the child is concerned. I'm afraid that the most significant harm has already been done to the child and I really doubt that anybody here is going to somehow repair that damage." (T4JAN82P?1L6)

Thus Judge Kearney admitted that the court's action in this matter, the unjustified award of divorce and its denying the child a meaningful relationship with his father, as stat-

ed in Beck v. Beck, op cit, has significantly harmed the child.

After several delays and legal maneuvering by the plaintiff's attorney, a court hearing on the defendant's June 3, 1982 Motion was heard by Judge I.W. Rubin on August 17, 1982. The order was issued on September 13, 1982. Oddly the order states the matter was opened to the court by Robert Shea Esq., the plaintiff's attorney, when the Motion was the defendant's. The order states the matter was heard on July 22, 1982, yet the matter was heard on August 13, 1982. The order does grant the defendant joint legal and physical custody of both children, grants the defendant credit for monies paid for the oldest son's support while he was living with him, and eliminated the garnishment of the defendant's wages. It also addressed a number of other issues not part of the defendant's motion, yet failed to address issues raised in the defendant's motion. It is very clear that once again legal chicanery has

taken place. However,the defendant and his children have faired a little better in this latest effort to obtain justice.

During this time frame the defendant was informed that the N.J. Supreme Court permitted the plaintiff to file her response out of time. On October 5, 1982 the Supreme Court denied the defendant's petition for certification (A-23). He subsequently notified both the N.J. Supreme Court and the Appellate Court that he was applying to this Court for a Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The New Jersey courts have blatantly denied the defendant's rights guaranteed by the New Jersey and United Stated Constitution and continue to do so despite his pleas for justice and equal protection under the law.

The defendant on numerous occassions has been draged into court for no valid reason on short notice, contrary to the laws and rules

of court. The courts have issued numerous unwarranted orders against the defendant without cause or justification. They have raped him of his children and deprived them of the meaningful relationship with their father which they needed and deserved. The courts have also humiliated and threatened the defendant using scare tactics to try to force him to conform to their unjust orders, have deprived him of his rightful and personal property and gave the plaintiff custodianship of the share of the marital home they awarded him until the youngest child is emancipated. Yet, they have tolerated and abetted the plaintiff's and her attorneys' illegal actions of fraud ,perjury, extortion, and barratry. The courts' actions in this matter are unconscionable and repugnent to all American principles.

From the presented facts, it is clearly obvious that legal chicanery has taken place. The defendant maintains that the divorce action was totally without merit. Instead of

dismissing the case, it was considered by the court and the divorce was granted solely because of the plaintiff' attorneys' influence on the court. It is also the reason for the unjust award of custody, and unjust property distribution, alimony and counsel fees. If the plaintiff wanted a divorce so bad, she could have obtained one under the "no fault" clause in the N.J. Statutes, Seperation, N.J.S. 2:34-2(d). However, would have been very unlikely that she could have faired as well as she did in the settlement, which did not suit her goals.

The defendant would like to point out that marriage is a contract. It is recognized as a contract by this Court, Dartmouth College v. Woodward, 4 Wheat 518, 693 4 L.Ed. 629 (1918). The Constitution states that no state shall pass any law imparing the obligation of contracts. Where, in any court, can a person request and be granted relief from a business contract simply because they wanted out of an obligation? Then made the

other party pay for it? Judge Kearney not only impared the obligation of contracts, he eliminated it.

The plaintiff's attorney argued on appeal that the court relied on the tender years doctrine in its award of custody. It is a fact that most states have abandon the tender years presumption because it discriminates against men on account of their gender and denies them equal protection of the laws. McGowan v. McGowan, 374 A.2d 1306 (Pa. Super. 1977), McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1978), Bowen v. Bowen, 219 N.W. 2d 683 (Iowa 1974), Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S. 2d 285 (Fam. Ct. 1973). In Reed v. Reed, 404 U.S. 71, 76 (1971), this Court stated "..to give a mandatory preference to members of either sex over members of the other merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. Also, Caban v. Mohammed,

441 U.S. 380 (1979), "The maternal and p ternal roles are not invariably different in importance". The trial court definately gave perference to the female in this matter throughout this entire litigation.

The defendant maintains that the lower court in effect made ex post facto rules and law by granting the divorce. Judge Kearney's feeble reasoning is not in accordance with the law. The Constitution requires laws to state specifically what conduct will result in a person being deprived of life, liberty or property. This Court said that "Vague laws in any area suffer a constitutional infirmity", Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed. 2d 469 (1966). Also the words "contemptous treatment" appearing in Massachusett's law to be void for vagueness, Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed 2d 605 (1974).

The defendant is not seeking anything in this action which is not rightfully his. All he is asking is that he be given equal treat-

ment under the law. He has served his county in the armed forces to uphold the constitution and presently is contributing to the national defense in the high technology defense industry. He feels he should be at least given the same rights as criminals in a court action. He therefore respectfully prays that this Court grant him these rights that he has helped protect.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decisions and conduct of the New Jersey Courts in this matter.

Dated:
December 29, 1982

Respectfully submitted,
Lawrence M. Johmann
LAWRENCE M. JOHMANN
pro se

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(201) 349-1509

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JUDGE W.J. KEARNEY

OCEAN COUNTY COURTHOUSE
C.N. 2191
TOMS RIVER, N.J. 08753

April 2, 1981

Gelzer & Kelaher, Esqs.
CN 2028
Toms River, New Jersey 08753

Mr. Lawrence M. Johmann
60 Bowline Street
Beachwood, New Jersey 08722

Re: Johmann v Johmann
Docket No. M-28346-78

Gentlmen:

With reference to the above captioned matter, please be advised as follows:

1. Divorce is granted to plaintiff for extreme cruelty, consisting basically of an attitude of the husband apparent to the Court, best characterized as obsessive-compulsive. This personality, in conjunction with the personality of the wife, constitutes extreme cruelty. If this case had ended more quickly, and if fewer papers had been filed

by the defendant, appearing pro se, this might well have escaped the notice of the Court. This is a true Gazzilla case.

2. Custody in granted to the plaintiff. Unspecified liberal visitation is allowed.

3. Counsel fees in the amount of $1,500.00 are allowed to plaintiff's attorney to be paid by the defendant. Defendant's application is denied. Defendant is also to pay the outstanding bill of Dr. Isseroff in the amount of $200.00 and the appraisal bill of Potter & Taylor in the amount of $75.00.

4. Plaintiff shall have the right to remain in the marital domicile with the children. The house is to be sold when the wife remarries or the youngest child is emancipated and the net proceeds shall be equally divided between the parties. The household furnishings shall remain with the house and be sold or divided when the house is sold so that each has an equal share.

5. Automobiles:

The 1980 VW to the husband.

The 1975 VW to the wife.

6. Any and all bank accounts or certificates of deposit are to be equally divided between the parties.

7. All stocks, except Lockheed, are to be divided equally. Lockheed stock to go to the husband.

8. Insurance policies shall remain the property of the husband with wife beneficiary as trustee for the children.

9. The defendant shall maintain in effect the present hospitalization and medical insurance through his employment for the benefit of the children. In the absence of such insurance, defendant shall be responsible. If possible, such policies shall also cover the plaintiff.

10. The defendant shall pay child support of $50.00 per week per child and, for a period of three (3) years, the sum of $100.00 per week as rehabilitative alimony.

11. No provision is made as of this time for future educational expenses.

The basis for the 50-50 split was arrived at by considering all factors including the unusually large contribution brought to the marriage by the defendant and the unusual difficulties faced by the plaintiff in having left her home and familiar surroundings to enter the marriage.

Mr. Shea will prepare the order and submit to the Court on the five day rule.

Exhibits may be picked up at my office.

Very truly yours,

WILLIAM J. KEARNEY, J.S.C.

WJK:mm

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CN 2028
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Telephone: 201-349-1212

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, OCEAN COUNTY
DOCKET NO. M-28346-78

EVELINE JOHMANN,

Plaintiff,

-vs-

LAWRENCE JOHMANN,

Defendant.

Civil Action

FINAL JUDGMENT FOR DIVORCE

This matter coming to be heard in the presence of Gelzer & Kelaher, attorneys for the plaintiff, (Robert C. Shea, Esq. appearing) and Lawrence Johmann appearing pro se, and the Court having heard and considered the Complaint and proofs, and it appearing that the plaintiff and defendant were married and the plaintiff having pleaded and proved a cause of action for divorce under the statute in such case made and provided, and the plaintiff has been a bona fide resident of

this State for more than one year next preceding the commencement of this action, and jurisdiction having been acquired over the defendant pursuant to the Rules Governing the Courts.

It is this 28th day of April, 1981 ORDERED and ADJUDGED that pursuant to the statute in such case made and provided, that the marriage between the parties is hereby dissolved. On the Complaint and the Counterclaim.

It is further ORDERED as follows:

1. The Plaintiff shall have custody of Lawrence Johmann, Jr. and Brian Johmann, the infant children born to the marriage.

2. Defendant shall have reasonable rights of visitation with the infant children of the marriage.

3. Defendant shall pay child support of $50.00 per week per child.

4. Defendant shall pay to the Plaintiff for a period of three (3) years the sum of $100.00 per week as rehabilitative alimony.

5. Plaintiff shall have the right to remain in the marital domicile with the children. Defendant is ordered to vacate the premises immediately. The said house is to be sold when the wife remarries or the youngest child is emancipated and the net proceeds shall be equally divided between the parties. The household furnishing shall remain with the house and be sold or divided when the house is sold so that each has an equal share.

6. Defendant shall retain ownership of the 1980 Volkswagen Rabbit. Plaintiff shall be the sole owner of the 1975 Volkswagen Rabbit.

7. Defendant shall maintain in effect present hospitalization and medical insurance through his employment for the benefit of the children. In the absence of such insurance, defendant shall be responsible. If such hospitalization and medical insurance is in effect, such policies shall also cover the plaintiff.

8. All stocks, except Lockheed, are to be divided equally. Lockheed stock is to go to the defendant. More specifically, Perkin-Elmer Corp. stock, such stock approximating $2,400.00, shall be divided equally.

9. United States Savings Bonds in the amounts approximating $1,250.00 shall be divided equally between the parties.

10. The Savings Account at Lockheed Electronics approximating $4,000.00, shall be divided equally between the parties.

11. Lockheed Federal Credit Union account, with an approximate balance of $2,000.00, shall be divided equally between the parties.

12. Any and all additional bank accounts or certificates of deposit are to be divided equally between the parties.

13. The 1980 Internal Revenue Service refund or homestead rebate shall be divided equally between the parties.

14. Defendant shall pay counsel fees in the amount of $1,500.00 to plaintiff's attorneys, Gelzer & Kelaher.

15. Defendant's application for services is denied.

16. Defendant shall also pay the outstanding bill of Dr. Avraham Isseroff in the amount of $225.00 and the appraisal bill of Potter & Taylor in the amount of $75.00.

WILLIAM J. KEARNEY, J.S.C.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3887-80T1

EVELINE G. JOHMANN

PLAINTIFF-RESPONDENT

v.

LAWRENCE M. JOHMANN

DEFENDANT-APPELLANT

Argued March 16, 1982 Decided March 30, 1982

Before Judges Botter and Antell.

On appeal from Superior Court, Chancery Division, Ocean County.

Lawrence M. Johmann, pro se, argued the cause for appellant.

Robert C. Shea argued the cause for respondent (Gelzer & Kelaher, attorneys; Mr. Shea, on the brief).

PER CURIAM

On this appeal from a divorce judgment entered on April 28, 1981, defendant contests (1) the award to plaintiff of custody of the two sons of the marriage who were 4 and 12 years old in 1981, rather than awarding, at the least, joint custody; (2) the equitable

distribution of property which defendant contends was unreasonable and included assets of defendant acquired prior to the marriage which should have been excluded from distribution; (3) the award of alimony and child support which defendant contends was excessive in view of plaintiff's misconduct, perjury and fraud on the court, and (4) the award of counsel fees to plaintiff when, instead, defendant should have been given compensation for his expenses. In his brief plaintiff also asserted that a judgment of divorce should not have been entered in favor of plaintiff on the ground of defendant's alleged marital wrongdoing and cruelty. (The judgment of divorce dissolved the marriage based upon plaintiff's complaint and defendant's counterclaim.) At oral argument, however, appellant withdrew his attack upon the divorce judgment, indicating that at this time contesting the divorce would serve no useful purpose.

With respect to custody of the children, there is ample support in the record for the award of custody to plaintiff. In his written opinion the trial judge adopted the evaluation of defendant's personality by the court-appointed psycniatrist, which, we infer, contributed to the judge's conclusion on the issue of custody. The psychiatrist's evaluation strongly favored the choice of plaintiff as the custodial parent, with liberal visitation afforded to defendant. He concluded that joint custody would be "out of the question, as Mr. Johmann does not appear to be able to work in a reasonable way with his wife." On the record before us, we find no basis for disturbing the conclusion reached by the trial judge as to custody.

The award of child support of $50 per week for each child and rehabilitative alimony at the rate of $100 per week for three years appears reasonable and appropriate in the light of defendant's income and the cir-

cumstances of the parties. On the record before us we conclude that these provisions should be upheld.

The award of counsel fees is reasonable and appropriate in this case. Contending that plaintiff's attorneys had already received $2500 toward counsel fees, defendant relies on transcripts of a telephone conversation between plaintiff and Deborah Bush (whose mother is defendant's cousin, according to defendant's affidavit), and a telephone conversation between plaintiff and her attorney. These conversations were apparently recorded by defendant without plaintiff's knowledge. The conversations suggest that moneys were loaned to plaintiff to be placed in a savings account in trust for plaintiff as security for payment of counsel fees. The telephone conversations makes it clear that plaintiff did not have the money to pay her own counsel fees and was unwilling to accept gifts even from defendant's relatives in

order to enable her to obtain a divorce from defendant. The conversation with Mrs. Bush clearly refutes defendant's contention that plaintiff wanted to dissolve the marriage "for her own selfish purposes and financial gain." Contrary to defendant's assertions that plaintiff resorted to "criminal acts of perjury, fraud, slander, assault, barratry, and conspiracy," the conversation indicates a sincere concern for plaintiff's welfare that was threatened by her continued cohabitation with defendant. In any case, the award of counsel fees was appropriate and reasonable.

With respect to equitable distribution, defendant contends that inadequate consideration was given to the assets which he brought into the marriage. The principal asset is represented by the proceeds of the sale of a house purchased by him before the parties were married which were used largely for the purchase of a second house and a vacant lot adjoining that property. Defendant also con-

tends that part of the furniture in the house was owned by him prior to their marriage. In this respect, the trial judge ordered that the household furnishings would remain in the house and would be sold or divided when the house is sold giving each of the parties an equal share.

Defendant's contention regarding the property brought into the marriage is not adequately answered by the trial judge's opinion or respondent's brief.[1] The trial judge stated:

> The basis for the 50-50 split was arrived at by considering all factors including the unusually large contribution brought to the marriage by the defendant and the unusual difficulties faced by the plaintiff in having left her home and familiar surroundings to enter the marriage.

These findings are inadequate. As stated in Reiser v. Simon, 63 N.J. Super. 297 (App. Div. 1960):

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[1] We are aware of the explanation offered by respondent's attorney at oral arguement.

> ...A trial judge must be explicit in his recital of the evidence and in his factual findings and must so corelate them to his legal conclusions that the ... judgment entered manifestly appears to be undergirded by legal proof of substantial probative value and by specific factual findings thereon. [Id. at 300-301]

Moreover, "[j]udges should always state their reasons so that counsel and an appellate tribunal may be fully informed," McCann v. Biss, 65 N.J. 301, 304, n. 2 (1974). Without adequate findings an appellate court cannot perform the function of deciding whether the determination below is supported by substantial credible proof. Mol v. Mol, 147 N.J. Super. 5, 9 (App. Div. 1977); Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super 1, 4 (App. Div. 1976); Harmon v. Harmon, 161 N.J. Super. 206, 211 (App. Div. 1978); Grayer v. Grayer, 147 N.J. Super. 513, 516 (App. Div. 1977).

Accordingly, we are compelled to remand

the case to the trial court for further proceedings on this issue. The court must determine what portion, if any, of the proceeds from the sale of the first house should be excluded from equitable distribution. We are aware, as noted in footnote 1 above, of plaintiff's contention that she contributed to the repayment of moneys used in the purchase of the first house and should, therefore, be considered to have contributed to the acquisition of that asset so as to make the property to which the proceeds were converted, namely, the second house and lot, eligible for equitable distribution. None of this was discussed in the trial judge's decision. We are aware, also, that even if some assets are excluded from equitable distribution, the remainder need not be divided equally. That is to say, the circumstances mentioned by the trial judge of plaintiff having left her homeland to marry defendant might have made her more needy and could

justify a higher allocation of the assets remaining to be divided.[2]

We affirm the judgment below except as to the provisions for equitable distribution. As to that issue, the case is remanded to the trial court for further proceedings, and the trial judge in his discretion may allow the parties to present additional proofs in affidavit or other form. We do not retain jurisdiction.

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[2] We say this not for the purpose of suggesting a result on remand. Rather, our purpose is to indicate to the parties the broad discretion of a trial judge that ought to be taken into account in any negotiations that may take place toward settlement of the dispute, recognizing the high cost of litigation relative to the modest means of the parties.

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JUDGE W.J. KEARNEY

OCEAN COUNTY COURTHOUSE
C.N. 2191
TOMS RIVER, N.J. 08753

June 18, 1982

Gelzer & Kelaher, Esqs.
CN 2028
Toms River, New Jersey
Attention: Robert C. Shea, Esq.

Robert A. Gasser, Esq.
201 Hooper Avenue
P.O. Box 1223
Toms River, New Jersey

Re: Eveline Johmann vs Lawrence Johmann
Docket No. M-23346-78

Gentlmen:

Pursuant to the instructions of the Appellate Division, I solicited from both parties any further proofs they wished to present. Neither party chose to use this opportunity.

The factual setting for the portion of the case remanded is simply stated. Prior to the marriage the defendant husband was the owner

of a house which, by the natural rise of the market and by improvements made, increased in value. In due course, the parties purchased a newer, larger home as tenants by the entirety and were able to arrange the financing for that home without the sale of the first home. Some time thereafter, the original home was sold, title having remained always in the name of the husband only. Some $15,000.00 of the proceeds of the sale were applied to the reduction of the first mortgage on the second house. At the conclusion of the trial I had given no special treatment to this $15,000.00, ruling that the asset contribution by the husband was in some way balanced by the sacrifice made by the wife in leaving her homeland and placing herself in a position where her resources were limited by the lack of familiar surroundings, family and friends.

Plaintiff wife testified that her parents had contributed some five to six thousand dollars to the marriage which

enabled the husband to make the required payments which in turn enhanced the value of the original house. The husband did not deny that contributions were made but questioned the amount. In a matter of this sort the husband was certainly the more reliable and credible witness and I am inclined to accept his version which placed a dollar value closer to $4,000.00. This would appear to be as properly excluded from the marital assets as the husband's house but does not fall into the same category. Since the money was not the property of the wife prior to the marriage it cannot be excluded from distribution.

Since there are no appropriate credits we find the husband making an additional contribution of $15,000.00 to the second house and this amount should be excluded from the distribution to both parties at the time of the sale and given to the husband.
However, the validity of the point I tried to make in a clumsy fashion remains and I direct

that the remaining proceeds from the sale of the house be divided on the basis of 55% to the wife and 45% to the husband because of:

1. Her relative lack of opportunity for financial equality based upon her background, education and resources.

2. The contribution made by her by her tolerance and acceptance of her husbands continuing education over most of the term of the marriage, which education has enabled him to advance and progress within his chosen field to a responsible and good paying position.

3. The probable discrepancy in the future earnings of the parties.

Mr. Shea is requested to draw an appropriate amendment to the final judgment.

Very truly yours,
WILLIAM J. KEARNEY,
J.S.C.

WJK:mm

SUPREME COURT OF NEW JERSEY
C-64 SEPTEMBER TERM 1982

19,820

EVELINE G. JOHMANN

Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

LAWRENCE M. JOHMANN

Defendant-Petitioner,

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3887-80T1 having been submitted to this court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 5th day of October, 1982.

Stephen W. Toundsend
Clerk